FILE COPY.

7633

Office Supreme Co
FILE
OCT 31 19
JAMES H. McKENNEY
C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. ~~254~~ 67.**

THOMAS TENNESSEE.....*Defendant in Error.*

Brief for Defendant in Error.

J. W. HOUSE,
J. E. WILLIAMS,
J. W. BLACKWOOD,
Attorneys for Defendant in Error

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. 351**

THOMAS TENNESSEE.....*Defendant in Error.*

Brief for Defendant in Error.

STATEMENT OF CASE.

This case was originally instituted in the State court of Arkansas and removed to the United States court on account of the Federal character of the defendant.

A verdict was rendered for the plaintiff for $5,000 and the defendant took the case to the United States Circuit Court of Appeals, where the judgment of the lower court was affirmed. See 53 C. C. A., p. 497. That decision is now here for review.

The plaintiff relied upon two grounds of negligence: first, that the step on the front of the engine or cowcatcher, where the plaintiff, in the discharge of his duty, was accus-

tomed to stand, was in an unstable condition and not properly fastened; and secondly that defendant's company was operating its train over a yard in the city of Little Rock where the ties stood up some fifteen inches from the ground and thus made a mantrap into which plaintiff was thrown; that if said ties had been properly filled in where plaintiff fell, he would have escaped injury.

That plaintiff was just beginning to run into the new yard upon the new track and its dangerous condition was unknown to plaintiff. That plaintiff fell from this defective step and was caught in between these ties and run over by an engine to his damages in sum of $5,000.

Defendant denied the allegation of negligence and plead contributory negligence on part of the plaintiff.

The proof shows that the engine had been used on the west end of this road in the Oklahoma Territory for some time and was an old passenger engine patched up and repaired and put into commission as a freight engine. The evidence shows that the step had been out of fix some time previous to the accident. That the step was entirely removed from the engine between the time of the accident to Tennessee, some time in the night on the 6th of February, and 8 o'clock next morning. The testimony is silent as to who removed it or why it was removed. When Tennessee stepped on it that night it gave away. His leg was cut off and he was allowed to remain on the ground unattended for some hours. After the step passed by him he was unable to investigate as to its condition or why it gave way. The defendant's agents and servants did not seem to have accounted for the disappearance of the step.

The company operated on the old switch for some time until finally Tennessee was informed that the new yard was ready for service. He had only gone into this yard once or

twice before the accident. He has had very meager opportunities for observing its condition, usually coming in after night and going upon his train which was already made up early in the morning to assist in taking it out.

We do not think appellants have made an attempt to comply with the rules of this court in abstracting the testimony. It is true that they have quoted very liberally from the testimony in their brief, the portions of the testimony favorable to them. We therefore supplement the abstract by the following testimony, which we think will throw light upon the position contended for by the appellee.

PLAINTIFF'S TESTIMONY.

WESLEY GRAVES: I was one of the brakemen with defendant when he got hurt. I knew the engine that ran over him. It was a C., O. & G. engine No. 5. It came down from the west end, a little before Christmas. I made a trip with this engine four days before the accident (Tr., p. 23).

I know the step; it was bolted to wood. A short time after the accident the step was not there. Early next morning I went down and looked at the engine and the piece had been removed. I had seen it the last trip, about three days before the accident (Tr., p. 24).

Being recalled Wesley Graves testified:

I saw the step the last trip I went out with the engine and cautioned my brother not to try to catch on to the pilot, that the footplate was loose on it (Tr., p. 41).

The engine came down from the west; it was a Rhode Island make and was some five or six years old. I made a trip with this engine from Argenta to Memphis something

like three or four days before Tennessee was hurt. I inspected it. The inspector could have found out the condition of that step if he had inspected it; it was loose; you could see the condition of it.

By the court: "Was it so loose that by stepping on it you could tell it was loose?

"A. Yes, sir."

This was three or four days before the accident. Next morning after the accident I went down through the yards and the piece had been removed. Was not on there at all (Tr., p. 42).

I have been switching for this company since 1888 till March last. The proper position of the head brakeman is to ride in on the front end of the engine going into North Little Rock, to line up switches and to keep an engine from derailing by going out of an open switch, and to see that the track is clear (Tr., pp. 42, 43).

"Q. Where does he stand?

"A. He is supposed to have a place to ride.

"Q. Where is that?

"A. Have a footplate on the pilot.

"Q. Is that the customary place for the head brakeman to ride?

"A. Yes, sir; that 's the proper place.

"Q. Were you in the habit of doing it?

"A. Yes, sir; I always do it; I do it up till this day.

"Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of?

"A. No, sir.

"Q. Do you know of any rules against it?

"A. I don't know of any rule to prevent a man from riding on there when they instruct him to ride on there.

"Q. Did you see the condition of those cross-ties at the time this accident occurred?

"A. Yes, sir.

"Q. What was the conditioin of them?

"A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in — none of the yard at all was filled in.

"Q. If it had been filled in between the cross-ties, how far would the pilot be from the surface of the ground?

"A. It would be something like three inches; three, or maybe four inches."

Cross-examination:

"Q. Do you profess to know what the rules of this company are?

"A. The Choctaw?

"Q. Yes, sir.

"A. No, sir; I don't profess to know the Choctaw rules.

"Q. Then what you said, you were just stating what the rules were on other roads?

"A. What I said was riding on the front end of an engine. That's Choctaw rules.

"Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

"A. Yes, sir; that's the instructions from the conductors."

If there were cars on the track you could not see the condition of track. You could only see it for a certain distance riding on the engine (Tr., p. 46).

"Q. Wasn't that new yard over there somewhat in a chaotic condition?

"A. Well, the tracks were all laid and in service.

"Q. They were all new weren't they?

"A. Yes, sir.

"Q. They were still working, weren't they?

"A. Yes, sir; they had quit work in the yards, and had the track laid, but not filled in.

"Q. If you go along the lead track you can see all the new yard can't you?

"A. Yes, sir.

"Q. When you go around that lead track you can get a pretty good view of the yards?

"A. Well, if there are cars standing on the track you can't see down the track.

"Q. After you get down in the lead track you can see the condition?

"A. Yes, sir.

"Q. If you are sitting up on the front end of the engine, you can see the condition of the lead track, can't you?

"A. Only for a certain distance.

"Q. As you go out you can see the condition of it?

"A. Yes, sir."

Redirect Examination:

"Q. You say you had been working for this company how long?

"A. Ever since the 23d day of December, 1888.

"Q. You worked for this company right along since that time?

"Yes, sir.

"Q. Up to what time?

"A. Up to the 18th of March, I believe.

"Q. You know what the custom was about these brakemen riding into yards?

"A. Yes, sir.

"Q. What was that custom?

"A. It's the custom to ride on the front end of the engine and line up the switches.

"Q. Was that the custom after the Choctaw & Memphis was bought by the Choctaw, Oklahoma & Gulf Railroad?

"A. Yes, sir.

"Q. Do you know whether these rules, these printed rules, were generally distributed to brakemen or not?

"A. In February or March when these rules were sent down they only got a small supply and they were only issued to the conductors and engineers and the brakemen didn't have any of them in their possession.

"Q. Did you ever have one of these books?

"A. No, sir.

"Q. Did you ever own one?

"A. No, sir.

"Q. Where did you see them?

"A. I seen them with the conductors; I only saw two or three of them. I never did see a brakeman with one.

"Q. What would be a safe condition for a track in a yard?

"A. Well, a safe condition for a track in a yard is for the track in the center to be filled, and on the outside of the ties and in between the rails, and blocks of timber in between the frogs.

"Q. You mean these spaces in between the ties are filled?

"A. In the yard they are supposed to be filled up level with the top.

"Q. Do you know when they first began to use these new yards?

"A. Well, no, sir; not exactly; I think it was before Christmas, a little before Christmas."

TOM TENNESSEE: I am 33; have been a brakeman and switchman for twelve or fifteen years; went to work for the Choctaw in December; then got my foot hurt and laid off in January, and did not go back any more until February 5. I ran from Brinkley to Memphis, then came in from Memphis on first schedule train.

"Q. When was that?

"A. In December, the 13th or 14th of December.

"Q. Where did you run from then on to the first of January or February?

"A. We run from here to Memphis and back.

"Q. What track did you run in on?

"A. We always generally come down the old main line. They didn't have the new yards fixed then. Later on I headed into the new yards about once before I laid off.

"Q. This jury probably do not know where the old main line was. Where did it go, down into Argenta?

"A. Yes, sir; it come right straight down into Argenta.

"Q. Where did the main line afterwards run?

"A. The main line still run down that way but they put in a lead, and there are seven or eight tracks between the lead and the main track. When the new depot was finished, the main afterwards turned and went across the bridge, and this lead line was the old main line.

"Q. You commenced, you say, about the middle of December to come into Little Rock. How many trips did you make before you laid off?

"A. I made one pretty near every day up until the time I laid off.

"Q. What were you running on?

"A. I was running on a freight.

"Q. What time did it get in here?

"A. Well, we generally got here about 9:30 or 10 o'clock. Sometimes in the morning we got in on time, at 6:10 (Rec., p. 25).

"Q. Was that before day?

"A. It was about daylight.

"Q. When did you generally get out?

"A. Generally about 6:40 the next morning.

"Q. Was that daylight?

"A. Yes, sir; just about daylight, but we had to use lanterns.

"Q. And you continued to run on that line until when?

"A. Well, we run in on the old main line until about Christmas. I went out Christmas eve morning and went to Memphis and didn't get out of Memphis no more until about the 27th. When we come back from Memphis we come into

the new yards. I come down the main line and the yard-master told me to back up head into the new yards, and I headed into the new yards."

Mr. Peirce:

"Q. That was when you were going to Memphis?

"A. No, sir; coming this way.

"Q. Did you make any more trips?

"A. No, sir; I laid off.

"Q. Did you lay off during January?

"A. Yes, sir; didn't work at all.

"Q. And you laid off; were you discharged?

"A. No, sir; I laid off myself; I got my toe cut and laid off."

Mr. Blackwood:

"Q. When did you return to your job again?

"A. I returned to work on the 4th or 5th, I think it was the 5th of February.

"Q. Where did you go when you came back to work?

"A. We went over to Memphis.

"Q. When did you get back?

"A. We left here Monday morning and started back Tuesday morning and got here about 10 o'clock that night.

"Q. Where did you start from on that trip?

"A. We started from Hopefield when we started back this way.

"Q. Where did you start from going to Memphis?

"A. We left from the new yard; we picked up our train around on the lead, I think it was track No. 8.

"Q. What time did you leave?

"A. We left here that morning about 7 o'clock; it may be a little after, about 7:40; we had to back over to the depot over the bridge before leaving."

* * * * * * * * *

"Q. You got back here about what time?

"A. About 10 o'clock at night.

"Q. That was the 6th of February last year?

"A. Yes, sir.

"Q. Just tell the jury what happened when you got to the yards?

"A. Coming in, I rid out from Carlisle — from Lonoke — I rid out from Lonoke, and I picked up a fellow and he rode with me into the yards here. I was sitting on the side of the train talking to him, and when we come into the yards I goes down to the engine. I jumps on the tank of the engine and goes on down into the engine. I gets down and throws the main line switch, and my lamp went out. I came back to the train and lit it, and goes on down and throws another switch and then walks on about sixty feet further and throws another switch. After that I undertook to get on the engine, at least, I did get on the engine, on the pilot, to ride on down to the lower end of the yards to see if the switches were all lined up. When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go.

"Q. How was your foot caught?

"A. My foot got hung between the ties, between the bottom of the ties, and held it fast. When my foot went down I couldn't get it out.

"Q. Then the condition of the ties is what made the accident possible?

"A. I couldn't get my foot out.

"Q. Explain to the jury how those ties are fixed.

"A. The ties were laid up on top of the ground and I suppose it was about eight or ten inches, probably more than that, from the top of the ties to the ground. When my foot went down I pulled my leg with all my might and couldn't get out. I pulled all the toe of my shoe off and bent the instep of my shoe back. I pulled with all my might, but I seen that I couldn't get it out and just give up and let it go.

"Q. What was the result?

"A. Well, the engine run over me when I fell, run over my leg. I hallooed as loud as I could to make the engineer hear me, but he didn't see me. But he must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could.

"Q. How fast were they running?

"A. They were running about four miles an hour.

"Q. Is that slow or fast?

"A. That's very slow.

"Q. When you got your foot caught under there the train ran over you and mashed your leg?

"A. Yes, sir; mashed it all to pieces.

"Q. Broke the bone?

"A. Yes, sir; broke the bone; mashed my knee cap all to pieces.

"Q. Try as you might you could not get out?

"A. No, sir.

"Q. Just tell the jury whether you suffered any or not?

"A. Why, I suffered just as near death as any man could suffer death and not die. It wouldn't have been as hard to die.

"Q. Did you lose consciousness?

"A. No, sir; I was perfectly conscious all the time.

"Q. How long were you left there on the ground?

"A. I lay there about an hour, I reckon. I lay there and begged them to send for a doctor. I told them to send for some doctor and let him put morphine or chloroform or something on my leg.

"Q. What was done with you?

"A. After I lay there about an hour, or longer I suppose, an engine from the west then pulled down into the yards and they took the engine off the other train and picked up our caboose and pulled down to where I was laying on the ground. Then they stopped awhile and said they didn't know how they would get me into the caboose. I told them if they would get close to me and help me I woud pull up into there. Then a man got on each side of me and I put my arms around them and raised myself up into the caboose; I put my hand on the step of the caboose and eased myself back and laid down" (Rec., pp. 28, 29).

* * * * * * * * *

"Q. Did you know that there was anything the matter with the step when you got on it?

"A. No, sir.

"Q. Did you know the condition of the ties, whether they were filled in or not at that time?

"A. No, sir; I didn't ever pay any particular attention to them. I never had been in there more than once or twice, and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two, or three, and sometimes on the lead.

"Q. You don't recollect ever having been on that track at all?

"A. No, sir; not that I know of.

"Q. What kind of a night was that?

"A. Well, it was raining, it was dark, it had been raining all day.

"Q. After you were hurt and were lying there on the ground, how far from the track were you?

"A. About a foot and a half from the track.

"Q. Did you notice the condition of the track?

"A. The ties were not filled in. I asked for my lantern and had it lit. I set it on the side of the track so if any engine came into the yards, they wouldn't run over me. I raised up and looked around at the ties and there wasn't any dirt between them.

"Q. Was there anything there between the ties?

"A. No, sir; just laying up on the ground.

"Q. Do you know what is the customary and safe way to fix yards?

"A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or anything for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

"Q. If it had been filled in level with the top of the ties, could you have got your foot caught in there?

"A. No, sir.

"Q. If it had been filled up level with the top of the ties, could you not have got your foot caught?

"A. No, sir.

"Q. If you had just slipped off, as they claim, and the ties had been filled in level, could you have got your foot out of the way of the engine?

"A. If the track had been filled level and I had slipped off I could catch myself. If they had been filled in level there would not have been any hole to get your foot caught in. I have been on engines before and my foot has slipped off and hit the ground and I could hold by my hands and raise up. In other yards where the ties were level I have slipped off lots of times and caught myself. There is no chance to get your foot caught in there. If you slip off you can raise your foot right up again" (Rec., pp. 30, 31).

* * * * * * * * *

"A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use. So I backed out and headed down the new yard" (Rec., p. 33).

* * * * * * * * *

"Q. Didn't the company have a rule against brakemen stepping on this step?

"A. I never had any instructions to that effect.

"Q. Did you ever have a book of rules of the company?

"A. No, sir.

"Q. How many roads did you say you had worked for?

"A. About seventeen or eighteen different roads.

"Q. Did those other roads have any rules?

"A. Yes, sir.

"Q. Didn't you get any when you came to this road?

"A. No, sir; I didn't get any.

"Q. When did you first find out that the step was defective?

"A. I didn't ever know it was defective" (Rec., p. 36).

* * * * * * * * *

"Q. You say there was another switch in ahead of you?

"A. No, sir.

"Q. At the time you got hurt?

"A. Yes, sir; there was some more switches.

"Q. When are you supposed to leave your engine and be done with your work?

"A. Not until we cut it off and carried it to the roundhouse and put it on the proper track.

"Q. And it is your business to stand on the front until the train is through?

"A. Yes, sir.

"Q. It was your duty to get on that step to make couplings and also to get on there and ride into the switch yard?

"A. Yes, sir; it is the head brakeman's place to ride in front of the engine.

"Q. Had anybody ever told you not to do that?

"A. No, sir.

"Q. And that was not only the custom of that road but of other roads?

"A. Yes, sir.

"Q. At the time you got hurt, when you tried to step on that step, state whether or not that was required of you by your duty?

"A. Yes, sir; I was at my duty.

"Q. Then you were in the discharge of your duty at that time?

"A. Yes, sir.

"Q. Now, why did you write to Mr. Wood? Did anybody ask you to put in a written application?

"A. No, sir; I was in a suffering condition and needed some money and was down sick and had nothing and wrote him simply for a compromise.

"Q. You didn't say anything about the step at all?

"A. No, sir.

"Q. And at that time had you been able to make any investigation as to the cause of your injury?

"A. No, sir; I never made any investigation" (Rec., pp. 38, 39).

* * * * * * * * *

"Q. Who told you to go into the new yards the first time you went in there?

"A. Mr. Wilson, the yardmaster.

"Q. He told you this yard was ready for use?

"A. Yes, sir.

"Q. When was that?

"A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

"Q. You went in on the new track, what side track did you go in on?

"A. I think it was No. 1 track.

"Q. You made how many trips after that into the new yards before you were hurt?

"A. About three.

"Q. What tracks were you on before?

"A. The first time we headed in on No. 2 and the next time all the tracks were filled up with cars and we went around on the lead.

"Q. Where did that throw you?

"A. That throwed us on the outside of the yard on the last track in the yard.

"Q. What track were you hurt on?

"A. No. 3.

"Q. You never had been on that track before?

"A. No, sir; I never had headed in on No. 3 track" (Rec., p. 40).

THOMAS TENNESSEE was recalled and testified as follows:

"Q. Did you ever have any of those printed rules like that book?

"A. No, sir; I never saw one until after I got hurt.

"Q. You never got any printed rules of this company?

"A. No, sir.

"Q. What was the number of the engine you say you were on?

"A. C., O. & G. engine No. 5.

"Q. Do you know what make it was?

"A. Rhode Island."

Cross-examination:

"Q. You know that all railroads generally have rules?

"A. Yes, sir; all the railroads I have ever worked for in my life furnished me with a copy of the rules before I went out.

"Q. You know then as a general rule railroads have rules?

"A. Yes, sir."

Redirect Examination:

"Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of an engine into a yard?

"A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

"Q. What do you mean by getting days?

"A. They would pull me off from my work and lay me off ten or fifteen days.

"Q. Trying to punish you for not riding on the front end?

"A. Yes, sir" (Rec., pp. 47, 48).

THOMAS TENNESSEE testified in rebuttal as follows:

"Q. It has been stated here that after you threw the switch for No. 3 you had no further business on the end of the pilot. Just state to the jury what, if any, business you had after you threw the switch and started to go on?

"A. Why, I didn't know how long the track was and didn't know whether it would hold the train or not. Didn't know the length of the track and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches.

"Q. How many other switches were there that you might have had to throw if this No. 3 had not been long enough to contain your train?

"A. Possibly three or four.

"Q. What switches were they?

"A. There was the lead switch to No. 3. I would have had to throw it because it was always lined up with the cut-off switch; and possibly No. 4 track or No. 5. Probably the switch might have been headed into the roundhouse track and I wouldn't have wanted to go over there.

"Q. You testified here yesterday that that was the first time you were ever in on this No. 3 track?

"A. Yes, sir; the first time I had ever put a train on No. 3 track.

"Q. You say you didn't know its length?

"A. No, sir.

"Q. You didn't know how many cars it would hold?

"A. No, sir.

"Q. What was the extent of your train?

"A. I don't know exactly how many cars we had. We had a pretty good train though.

"Q. Was it a through freight from Memphis?

"A. It was not a through freight; it was a local freight, but we picked up all the cars that were coming that way. They said we were the only crew coming this way and we picked up everything that was coming. Had a pretty good train.

"Q. At the rate of speed it was going just tell the jury whether or not it was dangerous for you to try to get on there, apparently dangerous.

"A. No, sir. With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still.

"Q. It was stated that you were warned at Forrest City about getting on this step, and that you got on it at a great rate of speed.

"A. Why, there wasn't anyone said anything like that.

"Q. Now you have heard the testimony of Mr. Vaughan and Mr. Kilpatrick and Mr. Cuneo, and probably some others, that you said that you suffered this injury by slipping off the step. Did you tell them that?

"A. I told them, each and every one of them, every time they talked with me about it that I stepped on the step of the engine and it gave way with me and I fell off" (Rec., pp. 93, 94).

Plaintiff testified as to how a new yard should be built, how it should be filled in, and showed he had had considerable experience in such work (Rec., pp. 96, 97).

DEFENDANT'S EVIDENCE.

A. C. ROBKINS: Was master mechanic of defendant's road at the date of the accident. He was informed of the accident when the engine rolled into the roundhouse. (Does not state *when* this was.)

"Did you examine the step? Yes, sir." It was all right, sound (Tr., p. 92). (He does not state *when* he examined it.)

MR. McKEISER: A machinist in roundhouse of defendant; as such he repaired engine No. 5; worked on the engine "as near as I can remember about six or seven hours." I don't remember how long after the accident — but the next morning. I don't remember making any repairs on the step. When there was a rush I had someone else to help me (Tr., p. 84).

Cross-examination:

Mr. Robkins was master mechanic. I was not running the shop. Mr. Robkins was. There were twelve or fifteen men employed in the roundhouse; I was the only machinist; I had a couple of darkies helping me; one of them is in the roundhouse yet; I don't know where the other is. I had no particular reason to examine the step. I took a casual glance at it. I did not go at it the first thing in the morning. I can't tell about what time I examined it. I made no record when I commenced. The record shows I worked six or seven hours

on the engine, but would not show when I began; have not examined the record. It would not show when I began nor when I ended. I finished about 4 o'clock in the afternoon. I was off from 12 to 1 o'clock at noon (Tr., p. 85).

No other employee of the roundhouse was produced as a witness; no record showing work was introduced.

R. A. VAUGHAN: A young man connected with defendants went to plaintiff, while in the hospital, and took a written statement — not verbatim — in which he stated he slipped. He did not say how he slipped or what made him slip. His alleged statement does not contradict his testimony given at the trial (Tr., p. 49).

TOM CUNEO: Was on the engine when the injury occurred, but did not see plaintiff when he was hurt.

This witness was an ex-employee and attempted to cover the case for defendant. He says (Tr., p. 55) that the yards had been in six or eight months before the accident. He was then led back by counsel to say it was only about one month. He constantly contradicted himself (Tr., pp. 59, 60). The jury evidently gave little weight to his evidence.

On cross-examination he said:

"Q. When you came up to him that night, you saw him plainly did you?

"A. Yes, sir.

"Q. Did you run him down?

"A. No, sir.

"Q. You saw him, didn't you?

"A. I did, standing still.

"Q. You didn't attempt to run over him?

"A. Certainly not.

"Q. You didn't think he was in any danger did you?

"A. No, sir.

"Q. You were running very slowly weren't you?

"A. Yes, sir.

"Q. In railroad language when you speak of a high rate of speed, were you running at a high rate then?

"A. No, sir; very slow.

"Q. It is customary for a brakeman to swing on to the engine when they are running at a slow speed, isn't it?

"A. Yes, sir" (Rec., p. 56).

* * * * * * * * *

"Q. Did you ever see brakemen jump on this step before?

"A. Yes, sir.

"Q. Is it customary?

"A. Yes, sir; when they make pilot-bar couplings.

"Q. Is it customary when they ride up to line up the switches?

"A. They seldom ever get on there.

"Q. They do it sometimes, don't they?

"A. Sometimes, yes, sir" (Rec., p. 56).

"Q. You didn't think there was anything unusual seeing him standing there?

"A. No, sir.

"Q. Did you think there was anything very unusual in seeing him trying to get on there?

"A. He was standing in the clear and I was in the engine looking at him. He just took a step right over and stepped on this little step.

"Q. You mean he was standing on the outside of the railroad irons or rails?

"A. Yes, sir.

"Q. And when the pilot came opposite him he made a step to get on this little step?

"A. Yes, sir.

"Q. You couldn't see whether he made it or not?

"A. No, sir; you couldn't see that.

"Q. You couldn't see him?

"A. No, sir.

"Q. Did you know he fell?

"A. No, sir; not until he hallooed.

"Q. Did you have any conversation with him right away?

"A. No, sir.

"Q. How long did you stay there with him, or did you stay there at all?

"A. Not over two minutes.

"Q. You just left him there?

"A. Yes, sir.

"Q. He was lying on the ground when (you) left?

"A. Yes, sir.

"Q. Lying on the ends of the ties?

"A. Yes, sir" (Rec., pp. 56, 57).

* * * * * * * * *

"Q. Was it anybody else's duty to inspect that engine?

"A. They have an inspector at the shop.

"Q. At what shop?

"A. The Choctaw shop.

"Q. Here at Argenta?

"A. Yes, sir.

"Q. Do they have an inspector at Hopefield besides the engineer?

"A. No, sir.

"Q. Who is the inspector over there at the shop?

"A. I don't know him. I am not working over there" (Rec., p. 57).

* * * * * * * * *

"Q. Mr. Cuneo, is it not a fact that if a brakeman would jump on that cowcatcher and not get injured it wouldn't excite any railroad man's attention whatever?

"A. I don't know that it would excite every man.

"Q. Is it not a fact that a railroad man would pay no attention to it?

"A. I paid attention to it" (Rec., p. 58).

* * * * * * * * *

"Q. Jumping on at that speed wouldn't have attracted any special attention if he had not gotten hurt?

"A. No, sir.

"Q. How long had you been an engineer?

"A. About thirteen months.

"Q. What are you doing now?

"A. Nothing" (Rec., p. 58).

* * * * * * * * *

"Q. Where is that engine?

"A. On the west end somewhere.

"Q. Do you know how old that engine was?

"A. No, sir.

"Q. Don't you know that that engine had no rear step at all?

"A. I don't know; all of those engines have steps on the back.

"Q. Is it not a fact that this engine didn't ever have any?

"A. All freight engines have got them.

"Q. Was that a freight engine at that time?

"A. Yes, sir.

"Q. Wasn't it a passenger engine?

"A. It was a freight when it was brought down here.

"Q. Was it built for a freight engine?

"A. It was built for a passenger engine" (Rec., pp. 58, 59).

A. M. McAVOY: Was roadmaster for defendant. The yards at North Little Rock was put in during October, November, and December — finished in December. The track was not filled in between the ties at the date of this injury. It has since been filled in; we filled it in in September and October last. It was our intention to make it something like level with the top of the ties (Tr., p. 62).

"Q. Did you fill in between the rails on all of these tracks?

"A. I wouldn't say all of them. We surfaced the yard and filled it in the best we could with the material we had. In order to surface the yard, we filled in between the tracks and put it in as good condition as we could, and after the yards were settled we hauled dirt and filled in.

"Q. On all of these tracks?

"A. I think so; I wouldn't be positive.

"Q. In order to surface the yard, you dug in between the tracks and threw dirt in?

"A. I said we hauled dirt there and threw in.

"Q. Was anything done to it after you completed it in December until this man was injured on the 6th of February?

"A. Not until last summer" (Rec., p. 62).

* * * * * * * * *

"Q. Wouldn't it make it all the more substantial if you had filled in between the ties with cinders and dirt?

"A. No, sir; it would go down in mud. It wouldn't drain.

"Q. Wouldn't that make it a more substantial track?

"A. Yes, sir; after it became settled" (Rec., p. 63).

JOE MEYERS: Was the fireman on the engine when the plaintiff was injured. Did not see the accident. Examined the step at 8 o'clock next morning and found it perfectly tight.

"Q. You say you were engineer on the night of the accident?

"A. No, sir; I said I was fireman.

"Q. You have been promoted since?

"A. Yes, sir.

"Q. You are engineer now?

"A. Yes, sir.

"Q. How long have you been an engineer?

"A. About four months.

"Q. Did you ever see the head switchman get on this little step when he was coming into the yards?

"A. Yes, sir.

"Q. If there had been other switches to throw, it would have been nothing unusual for him to jump on to this step and ride to the other switch?

"A. Well, if he had had to do other duty there.

"Q. But you claim he had no other duty?

"A. No, sir; his next duty was behind the engine.

"Q. If he had any other duty he ought to have been back on the step?

"A. Yes, sir.

"Q. Did this engine have any step in the rear?

"A. I think it did.

"Q. Don't you know that it did?

"A. I couldn't say.

"Q. It was an old passenger engine wasn't it?

"A. Yes, sir; I think it was.

"Q. Is it not a fact that these passenger engines don't have a step on it?

"A. Not on passenger engines, but I think this engine had a step on it.

"Q. You would not swear to that positively?

"A. No, sir.

"Q. How far in on switch No. 3 had your engine gone at the time this man was hurt?

"A. It was about ten feet from the points.

"Q. What were you doing?

"A. I was shutting the lubricator off.

"Q. Which side were you on?

"A. I was on the left-hand side.

"Q. He was on the right-hand side?

"A. Yes, sir.

"Q. Did you see him?

"A. No, sir.

"Q. Did you hear his halloo?

"A. Yes, sir.

"Q. Didn't you get down to see him?

"A. Yes, sir.

"Q. How long did you stay with him?

"A. About five minutes.

"Q. Then where did you go?

"A. I got back in my engine.

"Q. Where then?

"A. Went to the roundhouse.

"Q. How far away was the roundhouse?

"A. About a thousand feet.

"Q. He was lying on the ground that night?

"A. Yes, sir.

"Q. You stayed with him about five minutes, and that is all you saw of him?

"A. Yes, sir.

"Q. He was in great pain wasn't he?

"A. Yes, sir; he was in pain.

"Q. He didn't undertake to say exactly how he got hurt, did he?

"A. He only said when they asked him, that he slipped off the step.

"Q. Did you make a report to the company in writing?

"A. I signed the engineer's report.

"Q. Did he undertake to describe how he got hurt?

"A. No, sir" (Rec., pp. 71, 72).

R. W. HAINS: Was flagging on the caboose when plaintiff was injured. I did not see the accident. After the accident I was made a brakeman. He testified to the duties of a brakeman (Tr., pp. 73, 74), though he had never broke

at the date of the injury. He was a willing witness for the company, and secured most of his knowledge from the "book of rules."

HILLIARD GRAVES: Was a brakeman on the train when plaintiff was injured. I did not see the injury, but saw plaintiff in three minutes afterwards. He said he tried to get on the footboard of the pilot and fell.

"Q. Were you on that step any time that day?

"A. I remember getting on it once at Palestine.

"Q. Is that east or west of Little Rock?

"A. That's east of Little Rock.

"Q. What occasion did you have for stepping on it?

"A. We generally step on it to ride in. We were heading in.

"Q. Did you get on there to make a coupling?

"A. I got on there to ride in and make a coupling. We were heading in for the passenger train.

"Q. What was the condition of the step at that time.

"A. Well, it looked all right to me at that time.

"Q. Did it feel all right?

"A. I didn't pay much attention to it.

"Q. Where was this step?

"A. There was one on the left-hand side and one on the right-hand side.

"Q. Don't you know that there is no step except on the right-hand side of an engine?

"A. I think there were two" (Rec., p. 78).

* * * * * * * * *

"Q. Had you been warned by your brother not to get on that step?

"A. Yes, sir, he told me about catching on the step in front of an engine that way.

"Q. Did he tell you that the step was in bad condition?

"A. Why, he told me that none of those steps were safe to get on, No. 5, and other small engines.

"Q. Did he caution you about that particular engine No. 5?

"A. That was the first day we came out on No. 5.

"Q. Didn't he warn you not to step on No. 5?

"A. I was warned to be cautious about getting on all of those pilots.

"Q. Didn't you say a while ago that you were warned especially about No. 5?

"A. Yes, sir, he warned me about all of those small engines, and more particularly about these large engines. That No. 5 was a new engine, that was the first time I had ever seen that engine or handled it, to be on a train with it" (Rec., pp. 78-79).

* * * * * * * * *

"Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride in isn't it?

"A. Yes, sir.

"Q. If an engine was moving at a slow rate of speed, it is not very dangerous is it?

"A. No, sir.

"Q. It is not dangerous?

"A. No, sir, unless a person's scared of it, it's like playing with fire, it's liable to hurt you.

"Q. You didn't see Tom hurt?

"A. No, sir.

"Q. You say that he said that he jumped on this step and was hurt?

"A. That's what he said.

"Q. He was suffering a great deal and didn't talk much?

"A. No, sir.

"Q. You didn't worry him much about the details?

"A. No, sir, I just helped to carry him to the hospital.

"Q. You didn't ask him whether it broke or not?

"A. No, sir, only I asked him how he got hurt.

"Q. How long did you say you had been working for this road?

"A. I went to work the 13th day of September, 1892. That was my first trip.

"Q. How long had you worked before the 6th of February?

"A. I was employed by the company from along in October, 1897, up to that time; I had been off between.

"Q. Do you know the general custom as to head brakemen riding into yards?

"A. Yes, sir.

"Q. Was it customary for the head brakeman to jump on this step on the pilot and ride into the yards to line up the switches?

"A. Yes, sir, we always thought that was our duty" (Rec., p. 79).

S. H. BARNES: Was train dispatcher for defendant. Had only been in the employ of the company for thirty days

prior to the injury. His office was in south Little Rock, and he knew nothing of the facts in the case but undertook to testify as to the duties of brakemen (Tr., pp. 81-83).

F. C. WEAVER: Was running a freight train. Made only one trip with plaintiff December 20. His testimony has little or no bearing on the case (Tr., p. 87).

I. M. WIGHTMAN: Was general yardmaster:

"Q. In the discharge of his duty, is the head brakeman coming into the yards—is there any duty for him to perform which requires or is necessary for him to stand in front of the moving engine and attempt to step on that small step attached to the cowcatcher?

"A. No, sir, there wouldn't be unless he was heading onto a car.

"Q. Then what is his duty?

"A. When it comes up to the car he is supposed to get in front and make the coupling.

"Q. How near the car?

"A. Well, I don't know exactly. As a general thing he gets on at ten or fifteen feet from the car.

"Q. He is supposed to get on the step at ten or fifteen feet to make a pilot-bar coupling?

"A. Yes, sir" (Rec., pp. 88-89).

* * * * * * * * *

"Q. If there hadn't been room on that switch, wouldn't he have to throw a switch down there to let the train in on the lead track?

"A. If there wasn't room at the lower end, it is owing to how many cars it would hold. That switch will hold thirty-seven cars.

"Q. If there had not been room on that third switch, wouldn't the head brakeman have to throw two or three more switches down below?

"A. One.

"Q. Wouldn't he have to throw the switch where No. 3 joins onto the lead?

"A. Yes, sir.

"Q. And he might have had to throw No. 4?

"A. Might have had" (Rec., p. 89).

* * * * * * * * *

"Q. You have been in the employ of this road since 1894?

"A. Yes, sir.

"Q. You came down from the west division?

"A. Yes, sir, I came from Shawnee.

"Q. I will ask you if when a man gets on the front end of the engine to make a coupling if he doesn't get on twelve or fifteen feet before it comes to the car?

"A. Yes, sir, generally, and places his pin on to the car he is coupling to.

"Q. Then as a matter of fact they usually get on this pilot before the engine stops entirely?

"A. There has been a rule that they couldn't do it.

"Q. I am not talking about the rule, is it not a fact that they do do it?

"A. Yes, sir, some men do.

"Q. Is it not a common thing for them to jump on this step ten or fifteen feet before they come to a stop?

"A. If they are going very slow.

"Q. If they are going slow is it safe?

"A. Sometimes it seems not to be, but a man takes his chances" (Rec., p. 90).

A. H. KILPATRICK: Was claim agent; says plaintiff told him he went to get on the pilot and slipped (Tr., p. 92).

BRIEF.

The principles of law involved in this case have been so often considered by this and other courts of last resort, that we feel it a work of supererrogation to attempt to enlighten the court. There can be now little dispute upon the propositions that it is the duty of the master to provide a safe place and safe machinery in which and with which the employee is to work; that this is a positive duty resting upon him which he cannot avoid by turning it over to another employee; that on the other hand the master is not an insurer and does not guarantee that the place and machinery shall be absolutely safe; that the master is bound to take reasonable care and make reasonable efforts; and the greater the risks which attend the work to be done and the machinery to be used, the more imperative is the obligation resting upon him; that the servant himself must use due care; that he assumes the risks and dangers incident to his employment that are obvious and apparent; that the servant is not bound to make an examination or inspection to find defects; he is not bound to search for dangers except those risks that are patent and obvious to the senses or ordinary observation.

With the principles of law so well known and settled, it seems to us that all that is left for the court is to see that the charge of the learned trial judge to the jury was in accord with these principles of law and then to see if there was evi-

dence — whether conflicting or not — sufficient to justify the jury as reasonable men in bringing in a verdict for the plaintiff.

And in viewing the testimony this court will look at the acts of plaintiff, in determining whether he was guilty of negligence or not, from the standpoint of "a man of ordinary prudence in the same calling and under the circumstances in which plaintiff was placed," using the language of Justice Harlan in 128 U. S., 94. What would seem to your honor imprudent, dangerous or hazardous would to a man in the same calling be perfectly safe. While it might be gross negligence in a lot of sedate judges, learned statesmen or college professors, to enter in a game of baseball or football, or to go rowing in a frail racing scull, yet to a lot of college athletes it would be perfectly prudent and safe.

As was intimated by Chief Justice Fuller in 159 U. S., 611, the care for a man's personal safety, the love of life, the principle of self preservation, are enough to keep a person of sane mind from recklessly exposing himself to such danger or peril as would amount to such negligence as would justify the court in declaring, as a matter of law, that it was negligence *per se*.

With Tom Tennessee's experience as a brakeman, could any sensible man in the same calling have said in advance of the injury that he was reckless or exposing himself to an obvious and certain danger when he attempted to board the pilot step? He tells us (Rec., p. 94): "With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing

with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still."

Even Tom Cuneo, the most willing witness for the railroad, says (Rec., p. 58) that plaintiff's jumping on the pilot at the slow rate of speed the engine was moving attracted no special attention; that he paid no attention to it; that he had seen other brakemen jump on this step (Rec., p. 56).

The yardmaster, I. M. Wightman, says: "It is a common thing for brakemen to jump on this step ten or fifteen feet before the engine comes to a stop" (Rec., p. 90).

Other witnesses testify to the same thing, but why should we waste time on questions where the evidence was at least conflicting and the jury has passed on it in our favor?

We will attempt to follow appellant's counsel briefly in the order adopted by them in their brief.

Alleged Defective Condition of Step.

(Page 21 of Appellant's Brief.)

Counsel attempt to review the evidence on the condition of the step. The contradictory statements of Cuneo, his manner of testifying, entitled his testimony to very little weight before the jury. He claims to have inspected the engine and found it all right. He says the company has an inspector at Argenta but none at Hopefield. He could not tell who the inspector was (Rec., p. 57), neither was he ever introduced as a witness. No record of any inspection was introduced. It was merely the casual inspection of trainmen and of two of the shop men whose testimony we shall refer to later.

Counsel next take a brief excerpt from plaintiff's evidence. He says he did not know there was anything the mat-

ter with the step when he got on it (Rec., p. 30). He "knew his foot went down. It did not slip that way; it went straight down" (Rec., p. 37).

The counsel for appellant handled A. C. Robkin, the master mechanic, very gingerly. He did not state *when* he examined the step, or *when* he found it all right. No record was produced; no effort was made to show the previous history of the step, its construction, or age or its previous condition. His testimony does not cover a half column in the record. He was the man above all others who ought to have been able to shed most light on this issue.

The next witness whose evidence is noticed is Mr. McKeiser, a machinist. He did not produce his record; did not know when he went to work on the engine — (not before 9 o'clock if he worked six hours and quit at 4); he had no reason to notice the step — there was no complaint of it; he had a couple of "darkies" helping him; there were twelve or fifteen hands in the shop; he took a "casual glance" at the step (Rec., p. 85). No one else from the shop or roundhouse testified; the "darkies," helpers to the machinist, were not called at all. The mere fact that the evidence shows the company had an inspector at Argenta, whose special duty it was to inspect these appplianees, and that he was not called, shows that no such inspection was made as the law requires.

HILLIARD GRAVES was on the step at Palestine, near the Memphis end of the road: "*We generally step on it to ride in.*" The step looked all right then. I didn't pay much attention to it. On cross-examination he stated that he had been warned by his brother that the step on this No. 5 engine, and other small engines, was not safe. No. 5 was new to me;

it was the first time I had ever been on the train with it (Rec., p. 78, 79). The testimony of Vaughan and Kilpatrick that plaintiff said he had slipped off does not contradict him. He says the step went down and that caused him to slip (Rec., p. 36). Appellants say that there is not a word of evidence to sustain any charge of negligence as to the step.

We claim there was ample evidence to sustain a finding of the jury that the step was unsafe.

First, it was an old passenger engine, changed into a freight; it was brought down here from the western division. There was no evidence introduced by defendant to show its history, how old it was, or how long it had been in use (Rec., pp. 23, 42, 58, 59). These facts were peculiarly in the knowledge of defendant.

Second. The step was fastened to the wood and hence was liable to get out of fix by natural wear and tear (Rec., pp. 23, 24).

Third. Wesley Graves testified that some three or four days before this injury he saw this step and cautioned his brother not to catch on to that pilot, that the footplate was *loose* on it (Rec., p. 41). That the inspector could have seen it (Rec., p. 42); that he went to look at it early next morning after the accident and that it was not there (Rec., pp. 24, 42). This corroborates plaintiff's evidence that the step went down and that he did not simply make an effort to get on to a sound step, securely fastened and then slipped, as defendant contended was the case.

And lastly, *Res ipsa loquitur.* A sound step, properly constructed and fastened, does not go down when stepped upon. If the breaking or giving away of the step was not

prima facie evidence of negligence it certainly was *prima facie* evidence of a weak or unsafe condition of the step. See

57 Ark., 435.

54 Ark., 209.

61 Id., 381.

28 L. R. A., 596.

We think a reasonable theory for the jury was this: The step was old and infirm. It was fastened to wood and by natural wear and tear came loose; it was perhaps tightened up between the time Wesley Graves saw it loose and the fatal trip to Memphis. It might have been *apparently* safe at Hopefield and Palestine. The jarring, the use and bad weather might have assisted in getting it loose by the time it got into Argenta, particularly so as it was an old engine that had seen much use. The famous "One Horse Shay" went all to pieces at once. Everything human and of human construction must have its day of dissolution — a time when it must come to an end. It was the railroad's duty to prevent, by constant inspection, the state of facts that happened to plaintiff.

There is not necessarily any conflict of evidence between the statement of Tennessee and appellant's witnesses on the condition of the step after the accident. Tennessee says "it went down" with him. Wesley Graves says early next morning it was not there. Appellant's witnesses do not fix definitely the time when they examined the step after the accident with the exception of Cuneo. There was an *interim,* in the early morning, when some of the ten or fifteen employees in the roundhouse may have taken the step off and replaced it, so that when McKeiser, the machinist, saw it, it was sound or

appeared sound. The jury had to disbelieve both plaintiff and Wesley Graves or find that the step "went down" or was removed from its fastening. This was a mixed question of fact for the jury.

There was certainly no such showing made of the inspection, and the condition of the step as was shown in Davis v. Ry. Co. in 53 Fed. Rep., so confidently relied upon by appellant.

The alleged negligence as to the condition of the track at the place of injury.

(Page 28 of Appellant's Brief.)

The argument by appellant's counsel upon this branch would have been proper for the jury; but they have heard it, and considered it and decided against appellant. Counsel say: "It cannot be said, as a matter of law, that it is negligence to use a track before the spaces between the ties have been filled in." We make no such contention; it is a question of fact for the jury to say under all the circumstances of the case whether it is negligence.

Plaintiff says: "It is the general rule to fill in the tracks up level with the top of the ties so there will not be any holes or anything for a man's foot to get caught in while coupling and uncoupling cars. All the yards are filled in perfectly level as a rule" (Rec., p. 30).

Again plaintiff says: "If the yard had been filled in level I could not have got my foot caught. If the track had been filled in level and I had slipped off, I could have caught myself; there would have been no hole to get my foot caught in" (Rec., p. 31).

WESLEY GRAVES says, if the yard had been filled in the pilot would have only been about three inches from the surface (Rec., p. 43). Any sensible man knows if the ties had been filled in that it would have been impossible for his foot to have got caught. His foot was caught and plaintiff lost his leg. McAvoy, appellant's roadmaster, admits that this yard has been filled in since the accident and that it is necessary and usual after the road settles (Rec., p. 62). His contention that it did not make the roadbed more substantial to fill it in with cinders and dirt was so improbable that the jury evidently did not take much stock in his statement.

Our Saxon ancestors had what was known as the trial by ordeal (4 Blackstone, 342). The accused was permitted to walk blindfolded, over nine redhot plowshares, laid lengthwise at unequal distances; and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty.

Now, we submit that the contention of the appellant bears some similarity to this trial by ordeal. The railroad, whose duty it is to provide a reasonably safe place, where its servants may walk at all hours of the day and night, in fair weather as well as in foul, provides a series of mantraps and places its employees to work thereon; the skeleton track, where the ties, unballasted and unfilled, present a place where the fate of the employee may prove as uncertain as the Saxon suitor; so long as the servant performs his duty on these tracks he is innocent; but as soon as he gets caught, and loses his leg, then he is guilty of contributory negligence.

Justice Battle, in Ry. Co. *v.* Leverett, Admr., 48 Ark., 346, a well considered case, says: "In employing the deceased, the appellant assumed the duty of exercising reasonable care and prudence to provide him a safe place and tools to exercise the employment, and to maintain the place and tools in a reasonably safe condition, during the time for which he was employed; and the deceased assumed the risks and hazards which ordinarily attend or are incident to the service he was engaged to perform. The negligence of appellant to supply a safe roadbed or place and tools for the deceased, was not a hazard and risk usually or necessarily attendant upon or incident to the performance of his contract; nor was it one which the deceased, in legal contemplation, is presumed to have assumed, for the obvious reason that he was to use such roadbed, place and tools as were to be provided by appellant, and had and was to have nothing to do with constructing the roadbed and place, and purchasing the tools, or with the preservation or maintenance of such roadbed and tools in suitable condition after they were supplied. This risk is not within the contract of service. If it was, appellant would have been relieved of all pecuniary responsiblity for failing to perform the obligations he had assumed. Such a doctrine would be subversive of all just ideas of the obligations arising out of such contracts of service, and would withdraw all protection from such employees. A doctrine that leads to such results is contrary to reason, and unworthy the sanction of any court."

Tennessee's knowledge of the condition of the yard.

(Page 30 of Appellant's Brief.)

Plaintiff was informed by the yardmaster that the new yards were completed and ready for use (Rec., pp. 33, 39). He had a right to rely upon the fact that the master had done his duty, had provided him a safe place whereon to work; he did not have to investigate or inspect or look for dangers. He never was on track No. 3, where he was hurt, till the night of his injury (Rec., p. 39).

He says he had never gone out of the new yard more than three times (Rec., p. 33) and then generally by lantern-light; that he did not know the condition of the track; "I could not look at the new yard and watch my business;" "I think part of the tracks near the lead track were filled in" (Rec., p. 33). Plaintiff very frankly admits that if he had examined the yard at suitable times he could have seen the condition of the ties; but the law does not cast this duty upon him. He has a right to act upon the presumption that the master has done his duty. He says he did not know the condition of the track where he was hurt; did not see it till he was left on the cold damp ground on the night of the 6th of February, to observe it by the light of his lantern, as he quietly and patiently suffered from his wound.

The tracks were extensive. There were eight tracks besides cross tracks and switches; they were separated from each other by quite a space and these side tracks were sometimes filled with cars when plaintiff had gone in and out, thereby obscuring his view, and limiting his facilities for observation.

Was Tennessee in the proper place in the discharge of his duty at the time of the accident?

(Page 38 of Appellant's Brief.)

The testimony in this, as well as the adjudged cases, shows it is a common practice for the head brakeman to ride this pilot, both when coupling and when throwing switches. Plaintiff says he never had a book of rules; that he knew of no rule against stepping on this pilot (Rec., pp. 36, 47). "I have got days for not being on the front end of the engine; I mean by that they would pull me off from my work and lay me off ten or fifteen days as a punishment for not riding on the front end" (Rec., p. 48).

WESLEY GRAVES says the place for a head brakeman to ride is on the footplate of the pilot; that this was the customary place and the proper place. I am in the habit of doing it and do it up till this day (Rec., p. 43).

JOE CUNEO, a witness for defendant, says it was customary for brakemen to jump on this step (Rec., p. 56).

JOE MEYERS, one of the star witnesses for the defendant, was asked:

"Q. Did you ever see the head switchman get on this little step when he was coming into the yards?

"A. Yes, sir."

It would have been nothing unusual if he had had to do other duty there (Rec., p. 71).

HILLIARD GRAVES, another witness for appellant, says it is a very customary thing for a brakeman heading into yards to jump on the pilot step and ride. If the engine is moving at a slow rate of speed, it is not very dangerous. It

was customary and we always thought that was our duty (Rec., p. 79).

Counsel quote, in their brief, two and one-half pages from the testimony of one Barnes, a train dispatcher, and then invite the court to still further feast upon his evidence. He was like one of the Rulers of the Queen's Navy that stuck close to his desk and never went to sea. He had been with the defendant company less than thirty days; his office was on the south side of the river from these yards; he never went to instruct the men in person; his duties confined him to his office. We apprehend that this court will give no more weight to his evidence than the jury did.

I. M. WIGHTMAN, the general yardmaster of defendant, says that if the head brakeman was heading on to a car it would be his duty to get in front of the moving engine and get on the pilot step ten or fifteen feet before it reached the car (Rec., pp. 88, 89).

He stated that there might have been contingencies where plaintiff would have had other duties to perform after passing by switch No. 37 (Rec., p. 89). To the same effect is plaintiff's evidence (Rec., p. 93).

Appellant's counsel say Tennessee has established no necessity for attempting to mount that step on this occasion. He was acting in good faith, believing he was doing his duty; it was a dark winter night; the yard was new to him; he did not know the length of the tracks; he did not know how many switches he had to throw. As to whether plaintiff knew the condition of the track, or was in the discharge of his duty, or was it dangerous to step on the pilot, or whether there was a rule against it brought to the notice of plaintiff, or whether

the rule was habitually disregarded, are all questions for the jury. The jury has resolved them all in favor of plaintiff. The trial judge who saw the witnesses, and observed their mode of testifying, and saw all the phases of this case that cannot be reproduced upon the record, refused to direct a verdict for defendant, but submitted the question to the jury. We submit that under our system of jurisprudence their verdict should not be disturbed.

AUTHORITIES.

Every issue involved in this case was a question for the jury.

We have collected some of the leading cases bearing upon this question.

In Patton *v.* T. P. Ry. Co., 179 U. S., 658, Justice Brewer says:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be submitted to and determined by them, hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of the testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In Washington Ry. Co. *v.* McDade, 135 U. S., 572, Justice Lamar says:

"Upon every question in the case — the safety or unsafety of the machinery, the ignorance on the part of the plaintiff at the time of the accident, the evidence was controverted and rendered the case just such a one as this court in Jones *v.* East Tennessee Ry. Co., *supra*, said that 'a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury. In the language there used, we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." Citing

Dally *v.* Am. Printing Co., 150 Mass., 77.

Myers *v.* Hudson Iron Co., 150 Mass., 125.

In Jones *v.* E. T., etc., Ry. Co., 128 U. S., 443, plaintiff sued for being run over by an engine of defendant's company. The trial judge held that while there was evidence of negligence on the part of the railway company in running its trains at too great a speed, yet the defendant was guilty of contributory negligence and directed a verdict for the defendant. Mr. Justice Miller reversed the lower court, saying:

"It did not, therefore, permit the jury either to pass upon the negligence of the defendant company or the contributory negligence of the plaintiff. * * *

"But we think these are questions for the jury to decide. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.

"Instead of the course here pursued a due regard for the respective functions of the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In Kane *v.* N. C. Ry., 128 U. S., 94, Mr. Justice Harlan says:

"But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed to all the circumstances of the particular occasion."

The case was reversed with instruction to submit to the jury the question whether "a man of ordinary prudence in the *same calling*, and under the circumstances in which plaintiff was placed," would have done as he did.

"The question of negligence or contributory negligence should not be withheld from the jury, unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes negligence or contributory negligence, that the court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor."

Chief Justice Fuller, in Dunlap *v.* Ry. Co., 130 U. S., 652, citing the case of Kane *v.* Ry, *supra*, says: "The circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

In the B. & O. Ry. Co. *v.* Griffith, 159 U. S., 611, Mr. Chief Justice Fuller laid down the law in the following concise and forcible language:

"Since the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves and to keep out of difficulty, may properly be taken into consideration (Washington & G. R. Co. *v.* Goldman, 82 U. S. (15 Wall.), 401. It is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by Mr. Justice Lamar in Grand Trunk Ry. Co. *v.* Ives, 144 U. S., 408, 417: 'There is no fixed standard in the law by which a court is enabled

to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts.'"

As to whether the yard at north Argenta was properly constructed; as to whether it was in a dangerous condition was a question for the jury. Much of the testimony tends to establish the fact that it was an unsafe place for men to work in that they had to jump off and on their engines at all times of the day and night. It will be conceded, we take it, that side tracks in a depot yard in a city such as this yard is shown to have been, are not properly constructed until the spaces between the ties are ballasted so that a man's foot cannot get down and become fastened between the ties. Tennessee tells us that after his leg was cut off he was allowed to lie on the cold ground by the side of the track for over an hour before he was finally picked up and carried by the railroad to the hospital. During these silent vigils of the night he had ample opportunity with his lantern in hand to observe exactly how the ties were placed and how the track was constructed. He

tells us that the toe and heel of his shoe became fastened under these ties; that the sole of his shoe was doubled up and torn off his foot in his effort to extricate his foot from this trap. He further tells us if this had been filled in as it ought to have been that even had his foot slipped he could have extricated it without injury.

Appellants attempted to excuse the condition of this track on the ground that the yard was new and that it was necessary to allow the ties to settle down before ballasting the same. They put expert testimony on to sustain this contention. We submit that there is no proposition, however absurd, that may be urged by a railroad in defense of a damage suit that they cannot bring expert testimony to sustain. But this testimony at last is submitted to the consideration of an intelligent jury. It is so perfectly absurd to say that a track is safer without ballasting than with it that such testimony carries no weight with it. Besides the testimony on this point is conflicting and it was submitted to the proper arbiter, the jury, for its decision.

Tennessee was not guilty of contributory negligence.

In Warner *v.* B. & O. Ry. Co., 168 U. S., 348, Mr. Justice White, in reversing the trial court which had held as a matter of law that a person going on the trak before a moving train was guilty of contributory negligence, says:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. Grand Trunk Ry. *v.* Ives, 144 U. S., 408, 417, 489; B. & O. Ry. Co. *v.* Griffith, 159 U. S., 603, 611; T. P. Ry. Co. *v.* Gentry, 163 U. S., 353, 368. A like doctrine was thus

expressed by the Supreme Court of Pennsylvania in Pennsylvania Railroad Co. *v.* White, 88 Pa., 327, 333, a case in many respects analogous to the present one.

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury.

"We think the case presented by the record is not one where the facts inferable from the evidence were such that all reasonable men would, of necessity, draw the same conclusion from them, and the question of negligence was not, therefore, one of law for the court."

It is not negligence *per se* for even a passenger to leave a moving train.

L. R. & Ft. S. Ry. *v.* Atkins, 46 Ark., 423.

St. L., I. M. & S. Ry. *v.* Cantrell, 37 Ark., 523.

Nor is it negligence *per se* for a passenger to board a moving train, but is a question for the jury.

B. & O. Ry. *v.* Kane, 69 Md., 11.

Johnson *v.* Ry., 70 Pa. St., 357.

Swigert *v.* Hannible Ry. Co., 75 Mo., 475.

Stoner *v.* Penn. & Ry., 98 Ind., 384.

Texas & Ry. Co. *v.* Murphy, 46 Tex., 356.

Johnson *v.* Ry Co., 55 Cal., 593.

In O'Mellin *v.* Kansas City, etc., Ry., 21 S. W., 507, the court says:

"When it began to move it was going at the rate of two or three miles an hour, and it had only to move, even at this rate, five feet, before the deceased placed his foot upon the footboard; and we are asked to say that it was such a piece of recklessness in a switchman to make this attempt as to preclude all recovery. The proposition is utterly unreasonable upon its face. While we agree that the negligent and reckless

performance of a duty by one or all the brakemen or switchmen will not excuse one for following their example, we do not agree that it is necessarily negligent for one to step upon a properly constructed footboard of a slowly moving engine by one accustomed to that work.

"It was shown that there was no rule forbidding the brakeman and switchman from getting on these footboards under such circumstances. That daily for eight years it had been done in the presence of the officers of the defendant without a word of reproof or a rule made forbidding it. The circuit court would not have been justified in sustaining the demurrer to the evidence."

In Lockhart *v.* Little Rock & M. Ry. Co., 40 Fed., 632, the plaintiff was riding on the front of the engine on the footboard, and was killed. The company, as usual, pleaded contributory negligence. The learned judge disposed of the plea in language as terse and forcible as it was elegant.

After narrating the facts, he says:

"A switch engine of the Chesapeake road came along on its regular run of business, running at a rate variously estimated at four, six, seven, nine, and ten miles per hour by the witnesses. On it, among others, was the plaintiff's intestate, a switchman, whose duty it was to accompany this engine, riding on the footboard in front of the headbar of the engine, placed there for the use of switchmen. The blaze of the headlight from the Little Rock locomotive further obscured the engineer's vision, and it ran into the loaded cars, mashing the intestate to death.

"Was there ever a more hopeless case against a railroad company? I think not. The contributory negligence insisted on — and always the company lays hold of any circumstances that may be at hand to suggest that defense — was that the intestate did not ride on that part of the footboard at the rear of the engine, where he might have escaped. So he would have escaped if by some factitious circumstance he had not been on the engine at all, or if he had engaged in practicing law, and never had been a switchman at all. It is conceded that when throwing switches or otherwise engaged in front his duty called upon him and permitted him to ride on the front footboard; but it is assumed that because the engine was en route to its work further down the track he

should have ridden in rear while so en route; but by the same reasoning, if the collision through some other negligence of the defendant company had come from the rear, or if the engine in this very case had been running backwards, then the company would have said it was contributory negligence not to ride in front. Always, on this plan of constructing contributory negligence for a bulwark of defense, the unfortunate victim should have been in that place shown by the circumstances to have been the safe place. The court told the jury it need not consider the matter of contributory negligence, and this is clearly so, it seems to me. These switchmen accompanying a switch engine may ride on it anywhere, and cannot, as everyone knows, often tell what they may be required to do in emergencies that may arise. This man may have been wanted in front to couple to these very cars that brought him to his death, for all he might know, if the foreman had been going to drag them out of the way of trains, and he would have been so wanted if they had known they were there to endanger every life borne upon those rails until they were removed. How did he know that the foreman was not engaged in some such errand, en route, or on some other that would call him to the front? I should not dwell on this but for the desperation with which the contributory negligence was pressed at the trial, and the reference to the victim's being out of place, made in the brief on this motion."

In Donahoe *v.* B. & M. Ry. Co., 59 N. E., 663, the defendant urged that plaintiff was guilty of negligence in getting on a moving engine. The court says:

"The plaintiff testified that the place where he attempted to get on was the place where he had been in the habit of getting on. It was for the jury to say, we think, whether the plaintiff was not in the exercise of due care in attempting to get on where he did. It could not be ruled as a matter of law that he was not in the exercise of due care."

It was for the jury to say whether defendant exercised reasonable care in keeping its tracks in a safe condition for its employees to work upon.

Babcock *v.* Ry. Co., 150 Mass., 467.

Donahoe *v.* Ry. Co., 59 N. E., 663.

In Han *v.* N. Y. Central Ry., 21 N. E., 427, the plaintiff, a car coupler, was injured in the yards of defendant, by reason of a defective gutter. The evidence was conflicting but much stronger as tending to show knowledge on part of plaintiff than in the case at bar. The Court of Appeals of New York, through Potter, J., after reviewing the evidence, says:

"Although I might perhaps as a juror have reached a different conclusion in respect to the plaintiff's knowledge, yet as it was a question of fact, in regard to which evidence was conflicting, I am constrained to respect the conclusion of the jury found upon the conflicting evidence, and that this court is bound by the jury's determination of this question of fact."

In Mo. Pac. Ry. Co. *v.* McCally, 21 Pac., 577, the defendant pleaded that the plaintiff could not recover because he had voluntarily assumed a position of great danger by riding on the pilot and thereby directly contributed to his death. The court says:

"The question, then, as to whether or not the position taken by McCally on the pilot beam was under all the circumstances, dangerous, involved an issue of fact that was submitted to the jury, and necessarily passed upon by them in making their general verdict adversely to the railroad company."

The proof in that case, as in this, was conflicting as to whether this was the general custom; whether it was a safe place to ride; whether plaintiff was in the proper place for the discharge of his duties. After reviewing the evidence, the court says:

"It would naturally follow from such proof, first, that the position was not a dangerous one; second, that it was the usual place taken by brakemen in that yard when discharging the duties of switchman."

The court in this case distinguishes it from Ry. Co. *v.* Jones, 95 U. S., 439, and Hough *v.* Ry. Co., 100 U. S., 213, and Kresanowoki *v.* Ry. Co., 18 Fed., 230, where the plaintiffs were not engaged in switching or coupling cars, but voluntarily took positions on the pilot when they should have been elsewhere.

This court, in Northern Pac. Ry. Co. *v.* Nicols, 50 Fed., 723, held that a brakeman stepping in before a moving car going at the rate of four miles an hour, for the purpose of coupling cars, was not negligence *per se*, but was a question for the jury.

PROXIMATE CAUSE.

The fact that Tennessee stood in front of one side of the engine while it was moving towards him, with his cap pulled down, was not the proximate cause of his injury. He says that he stood just inside of the rail as the engine approached him so that he could step upon the pilot as it came up to him. **Cuneo says he was in the clear–outside of the rails (Rec., p. 56).** He was not injured by reason of the glare of the light, nor by reason of being in the way of the engine when it approached him. The light no longer blinded him when he attempted to step upon the pilot. He did not lose his balance until he got on the unsafe pilot step and the step gave way. So that the fact that he was standing on the track in front of the side of the pilot as it approached him, had nothing to do with his injury. The proximate cause of his injury was the step going down with him. Another concurrent proximate cause was the unsafe condition of the track. He was not injured until after he slipped off the step and his foot became fast under

the ties. Then it can be legitimately argued that if the step had not given way his foot would not have gone down. Then, for the sake of argument, we can admit that the step was in a safe and sound condition, and that if he slipped off of it in a safe and sound condition, yet, he would have escaped injury, as he tells us, if the track had been properly filled in. It was not properly filled in and his foot was caught in the trap. After it was caught in the trap he had ample time to think and to execute an effort to withdraw it. But he says he tried as best he could but was unable to extricate it from the ties. He tore his shoe nearly off in the effort and finally realizing the fact that he could not get his foot out and that it would be run over, he threw his body and his right foot outside of the rail and submitted to the inevitable.

THE DOCTRINE OF ASSUMED RISK.

In all of the cases cited by the appellant the doctrine is announced that where the danger is obvious and apparent and the servant is suffering under no disability that he assumes the obvious risks incident to the danger. There can be little dispute over this principle of law. The confusion of cases comes about out of the different views and opinions of juries, judges and courts upon whether the danger is obvious and apparent to the servant or not.

That is the condition of affairs in the case at bar. If Tom Tennessee could by ordinary observation or by the use of ordinary prudence have seen that the track was in a dangerous condition and that he was exposing himself to danger

by working over the same, then he assumed the risks incident thereto and could not recover upon this allegation of negligence.

But he tells us in his testimony that he never was on this particular track before. That he did not know that the ties were unfilled; that he had only made about two or three trips into this yard prior to his injury; that on these occasions it was generally dark; that he was intent upon his duties as brakeman and neither observed the condition of the track nor did he have fair and sufficient opportunities for discovering the state of the track or observing the danger. His testimony upon this point is borne out by other evidence. The question of knowledge then was a disputed question of fact which it was proper to submit to the verdict of a jury. The jury, after hearing the testimony, found for the plaintiff. The trial judge who heard the witnesses' testimony and observed their demeanor upon the stand, refused to take the case from the jury, but submitted this conflicting testimony for their decision. We submit that this court should not disturb their findings upon this state of facts.

The servant has the right to assume that the machinery and implements furnished him by his master are safe and suitable for the business engaged in.

Northern Pac. Ry. Co. *v.* Herbert, 116 U. S., 642.

Smith *v.* Car Works, 60 Mich., 508.

A general opportunity to observe the unsafe machinery, unsuitable rails or defective roadbeds, is not sufficient to bar recovery unless the servant actually knows, or by the exercise of reasonable care should have known, that the danger was apparent.

Devlin *v.* Wabash Ry. Co., 87 Mo., 545.

A conductor had passed under an insufficient bridge for three months and was injured. Held that he was not chargeable with notice of defect.

St. Louis Ry. Co. *v.* Irwin, 37 Kan., 701.

The servant stands on a different footing from the master and hence is not bound to the same degree of care in inspecting and investigating risk to which he is exposed.

Cook *v.* St. Paul Ry. Co., 34 Minn., 45.

Nor is the servant bound to investigate for himself a department with which he has nothing to do and to set up his judgment against that of his masters as to the appliances in use.

Devlin *v.* Wabash Ry. Co., 87 Mo., 545.

The cause of an injury, in cases of his kind, is for the jury.

Pullman Palace Car Co. *v.* Bluhm, 18 Am. & Eng. Ry. Cases, 87.

Before the court can presume as a matter of law that the servant assumes the risk incident to defective machinery, it must appear that he accepted employment with the actual knowledge of such defects or continued in the service after he knew, or in the exercise of reasonable care should have known of same.

Ry. *v.* Keeton, 87 F. R., 849.

Ry. *v.* Miller, 24 So., 955.

O'Neil *v.* Ry., 86 N. W., 1098.

The doctrine of assumed risk has no application when the servant first discovered the defect at the time of the injury.

Ry. *v.* Milam, 50 S. W., 417.

Sackewitz *v.* Mfg. Co., 78 Mo. App., 114.

The servant implied assumption of risk is confined to the class of work for which he is employed.

Ry. *v.* Adams, 23 Am. & Eng. Ry. Cases, 408.

AS TO THE RULES.

The testimony fails to show that Tennessee ever had a book of rules of this defendant; or that any rule was ever brought to his attention; he says he never did (Rec., pp. 36, 47).

Only the conductors and a few other employees received books, and they not until February or March. Tennessee says the only rule he knew of was the standard rule, that employees could not board a moving engine going at a high rate of speed (Rec., p. 47).

But as the rules, if any, were habitually disregarded they were not binding on the plaintiff and cannot bar his recovery in this case.

Northern Pac. Ry. Co. *v.* Nicols, 50 Fed., 721.

Barry *v.* Ry. Co., 98 Mo., 62.

Smith *v.* Ry. Co., 18 Fed., 304.

Leverett *v.* Ry. Co., 48 Ark., 348.

Fay *v.* Minneapolis, Etc., Ry., 11 Am. & Eng. Ry. Cases, 193.

II.

Learned counsel object to the following language used in the court's charge, to-wit:

"What it owes to its employees is to furnish machinery in a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident."

It is true that part of the language which relates to the duty of the master when unexplained by other parts of the court's charge has been subject to some judicial criticism. But when the entire charge of the court is considered it will be seen there is no just ground for such criticism in this case, and by applying the charge here to the case to which counsel refer (81 F. R., 679) it will be seen that the objections there made are fully met. The court further on in its charge and in the same connection says:

"It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence, not extraordinary but ordinary diligence, to have filled up this track — the spaces between the cross ties — before the time when the accident occurred on the night of February 5, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that the roadbed might settle and the yards be drained, as was testified to by one of the witnesses."

It will be seen from this that the court not only gave the correct idea as to the duty of the master in charging that its duty in such cases was the exercise of ordinary care, but this language was emphasized in favor of defendant when the court said "ordinary care was the measure of duty, not extraordinary care."

Again, further on in the same connection, the court said:

"Now, if you find that it has exercised due diligence, such as any ordinarily reasonable man would exercise in matters of that kind, then they would not be liable.

"But on the other hand, if they had not and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so for as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employees' safety, regardless of his own negligence."

In this case, however, the language used without qualification in other parts of the charge is not objectionable because the proof shows that the yard had been in a defective condition ever since its construction some time in December before the plaintiff was injured in February, and that no such inspection as the law requires had been made as to the step. In such cases it has been uniformly held that the language used by the court is not objectionable.

Pierce *v.* Clavin, 82 F. R., 552.

Bussey *v.* Charleston & W. C. Ry. Co., 11 Am. & Eng. Ry. Cas., 474-482.

Portland Gold Mining Co. *v.* Flaherty, 111 F. R., 317. Pamphlet December 3, 1901.

Ry. *v.* Gainus, 46 Ark., 570.

The court in 111 F. R. at page 317, *supra,* said: "Defendant next complains of the following portion of the court's charge to the jury, namely: 'It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work.'" Counsel contend that the court should have qualified the word "safe" as here employed by the adverb "reasonably," and not

having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

The court told the jury that the obligation resting on defendant was "to use ordinary care" to furnish a safe place so as not to "unreasonably" expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediately following context, namely: "This duty to use ordinary care, generally is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances." The charge as a whole, on this point, was substantially correct.

Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous.

The engine was furnished Davis, the engineer, and it was not the duty of the plaintiff as fireman to look after it;

and if it was defective and the plaintiff thereby injured, the defendant is responsible.

Ry. *v.* Pughsly, 39 S. E., 473.

In Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326, it was insisted that while it was the duty of the railroad to keep the track in a safe condition, yet as the plaintiff knew there was wood scattered along the track, near wood piles on the road, that he assumed the risk of stumbling over wood on the track where he was injured, although he did not know of it. The court held that general knowledge of the track at other places did not preclude him from recovering for an obstruction at the place where the injury occurred, and that the question of contributory negligence was properly left to the jury.

It is the duty of appellant to have and maintain good and safe machinery, structures and roadbeds.

Torans *v.* Ry., 4 S. E., 341.

Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326.

Vantrain *v.* Ry., 8 Mo. App., 540.

Lewis *v.* Ry. Co., 21 Am. Rep., 389.

Gibson *v.* Ry. Co., 46 Mo., 163.

Chicago Elec., etc., Ry. Co. *v.* Sweet, 45 Ill., 197.

III.

The third division of appellant's brief is devoted to the first of the two seventh assignments of error where the court uses this language: "Now as a general rule where the tracks are in a large railroad yard, where there is a great deal of traffic going on, and where a great many employees walk to

having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

The court told the jury that the obligation resting on defendant was "to use ordinary care" to furnish a safe place so as not to "unreasonably" expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediately following context, namely: "This duty to use ordinary care, generally is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances." The charge as a whole, on this point, was substantially correct.

Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous.

The engine was furnished Davis, the engineer, and it was not the duty of the plaintiff as fireman to look after it;

and if it was defective and the plaintiff thereby injured, the defendant is responsible.

Ry. *v.* Pughsly, 39 S. E., 473.

In Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326, *it was insisted that while it was the duty of the railroad to* keep the track in a safe condition, yet as the plaintiff knew there was wood scattered along the track, near wood piles on the road, that he assumed the risk of stumbling over wood on the track where he was injured, although he did not know of it. The court held that general knowledge of the track at other places did not preclude him from recovering for an obstruction at the place where the injury occurred, and that the question of contributory negligence was properly left to the jury.

It is the duty of appellant to have and maintain good and safe machinery, structures and roadbeds.

Torans *v.* Ry., 4 S. E., 341.

Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326.

Vantrain *v.* Ry., 8 Mo. App., 540.

Lewis *v.* Ry. Co., 21 Am. Rep., 389.

Gibson *v.* Ry. Co., 46 Mo., 163.

Chicago Elec., etc., Ry. Co. *v.* Sweet, 45 Ill., 197.

III.

The third division of appellant's brief is devoted to the first of the two seventh assignments of error where the court uses this language: "Now as a general rule where the tracks are in a large railroad yard, where there is a great deal of traffic going on, and where a great many employees walk to

and fro crossing the track, a company is required to use more diligence and keep the track in better condition than it would out in the country where no one ever passes over them." We submit that this is not only good law but common sense.

Mr. Justice Brewer, in the very late case of Patton *v.* T. P. Ry., 179 U. S., 658, says:

"He (the master) is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet in all cases it is a question of reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery."

Railroad companies, owing to the dangerous character of the business they engage in, are held to greater care in the operation of their machinery and machines, especially in running through towns.

L. R. & Ft. S. Ry. Co. *v.* Barker, 33 Ark., 373.

Brown *v.* Ry., 50 Mo., 465.

Indianapolis *v.* Ry., 131 Ind., 82.

Galveston, etc., Ry. *v.* Matula, 79 Tex., 577.

IV.

We submit that there is nothing in this branch of appellant's argument—and they do not seem to have made any effort to comply with the rules of the court in urging it. They do not even tell us where the words complained of are to be found.

V.

There was evidence that it was plaintiff's duty to get on the front of the engine. Wesley Graves says it was the

customary and proper place for the head brakeman to ride (Rec., p. 43). Plaintiff says: "I have got days for not being on the front end of the engine coming into a yard" (Rec., p. 47). Hilliard Graves says: "It was customary for the head brakeman to jump on the step on the pilot and ride into the yards." "Yes, sir; we always thought that was our duty" (Rec., p. 79). We submit that the court's charge was full and explicit and left the question of contributory negligence to the jury.

VI.

Apellant urges that the court erred in permitting the witness to testify as set out in the ninth, eleventh and thirteenth specifications of error. The authorities cited by counsel do not bear out their contention. They seem to have misconceived both the questions and answers of the witness. The witness was not asked whether the defendant made any changes or repairs after the accident. But in each case they were simply asked whether they knew the condition of the step just before or just after the accident. It was certainly competent to prove the condition of the step just before or just after the accident as reflecting light upon the condition of the step at the time of the accident. Defendant proved by several of the witnesses the condition of this step just before and just after the accident. The testimony introduced by the plaintiff upon this point was certainly competent if for no other reason to contradict the evidence of the defendant. But as these assignments are not urged with any show of earnestness by counsel, we think it hardly worth our while to waste any time upon them.

VII.

Whether the tracks in the North Little Rock yards were properly constructed and ballasted was for the jury, and expert testimony was not admissible. Tennessee's evidence was entitled to as much weight as McAvoy's.

Rodgers, Expert Testimony, p. 13.
Lawson, Expert Testimony, p. 94.
Ib., pp. 497, 520.

APPELLANT'S AUTHORITIES.

The case of Patton *v.* T. P. Ry. Co., 61 Fed., 259, 95 F., 244, and 21 Sup. Court Rep., 275, was decided by a divided court with an able dissenting opinion by Judge Toulmin. The majority of the court placed their opinion on the ground that there was *no* evidence to show negligence on the part of the railroad company; that the plaintiff himself had aided in securing the step two days before and there was nothing to show that it had been tampered with; that plaintiff and others had used it repeatedly just prior to the accident and had full and explicit knowledge of its condition; that the railroad showed continuous and frequent inspection and exhibited the greatest of care in the premises. The railroad in that case made a much stronger defense than in the case at bar.

In Cunningham *v.* Chicago, Milwaukee and Saint Paul Railway Co., 17 Fed. Rep., 49, 882, the plaintiff was standing in the middle of the track; the engine was backing towards him; "it is in proof that the defect in the footboard had nothing whatever to do with, and in no way contributed

to the accident of the deceased, for the reason that where he stepped or attempted to step, the footboard was unbroken." (p. 884). Stress is laid upon the fact that he got on *behind* instead of on the *side;* that he "did this of his own prompting and not because anybody told him to do it."

Even in this case the testimony appeared so conflicting and doubtful to the trial judge that he allowed it to go to the jury and then set it aside contrary to the general practice of Federal courts.

Chicago Elec. Ry. Co. *v.* Davis, 53 Fed., 61, the plaintiff deliberately let go his hold on the hand car and "went down upon the roadbed; he did not call out, or reach out to grasp anything or anyone, nor did he lose his balance or fall, but stood still as if he had stepped down, or walked a step or two towards the dump car" and was run over. In other words, he got on the track, where he had no business, without any object in view, and deliberately stood where he had no business and permitted himself to be run down; "unnecessarily exposed himself to a perfectly obvious danger." This is certainly a very different case from the one at bar.

Baker *v.* Barber Asphalt Paving Co., 92 Fed., 119, was where a driver was injured by a team running under a beam over the gate. There the driver was well acquainted with the facts; had driven under this beam for years; knew the difficulty and danger attending the business. The trial court directed a verdict for the defendant.

In Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed., 747, the plaintiff stubbed his toe on a blocking rightfully there and properly constructed. Secondly, he stepped in between

the two cars in the dark, while they were moving about four miles an hour, undertook to pull the pin with his hand, neglecting the lever placed there by the company for that purpose. The court (Sanborn, Judge) held that the defendant was guilty of no negligence and affirmed the lower court in taking the case from the jury.

Detroit Crude Oil Co. *v.* Grable, 94 Fed., 73, the defectively constructed machinery was the same as when plaintiff entered the service fourteen months previous. The court held that the defects and conditions complained of were obvious and known to the servant when he entered into the service and were constantly before his notice for fourteen months, while in the discharge of his regular duties; that he was a skilled, experienced engineer, with opportunities to observe and understand the danger superior to those of the master, and under the state of facts he assumed the risks incident thereto.

In the case of Finnell *v.* Delaware, etc., Railroad, 129 New York, 669, the court lays stress upon the fact that the plaintiff was an experienced brakeman; that he was acquainted with the locality where the accident happened; that it was a branch track not constructed for the purpose of running trains of cars upon, but for the purpose of storing cars; that it was not ballasted like the main track at the place of the accident; that the condition of the track was perfectly visible; that the accident occurred in broad daylight; that the engine had been backing several hundred feet where the condition of the track was plainly visible to the plaintiff.

These are different from the facts in the case at bar.

In Penn. Co. *v.* Hankey, 93 Ill., 580, cited by the New York case and set out in full in plaintiff's brief (p. 79), the place complained of and not ballasted "was built and used as a place for the temporary storing of cars; it was about two miles long; the main line and the part of this track south where it joined the main line at or near the switch, were ballasted and smooth;" this disaster occurred in broad daylight and after plaintiff had just walked over the same track, and knew it was not ballasted; plaintiff was a witness and did not undertake to say that he did not observe that this track was without ballast; plaintiff also had a duty of coupling to perform which would take some time and was different from merely jumping on a pilot where his attention was not diverted or divided.

In Andrews *v.* Ry. Co., 12 So., 432, the trial court directed a verdict for the defendant, holding that for a brakeman to jump on the pilot of a moving train and to walk in front with his back to the engine was negligence *per se*. The supreme court affirmed the city court.

These are the principal cases relied upon by appellant. We do not attempt to review all the cases cited. But we feel no hesitancy in saying that appellant has cited no case where either the trial or appellate court has ruled, as a matter of law, that acts similar to plaintiff's and under like circumstances, were negligence *per se*.

VIII to XVI of plaintiff's brief contains no point that requires the attention of the court under the rules as construed in

City of Lincoln *v.* Sun-Vapor Street Light Co., 59 Fed., 756.

The court of appeals held that whatever error there may have been in the charge of the court complained of by counsel was cured by other parts of the charge. Without going fully into the instruction of the court we call attention to the court to the following parts which we think gave the correct exposition of the law of the case.

The court instructed the jury properly in the following places:

As to the question of the footboard, just following the first excepted charge, the court says: "You are therefore to determine from the evidence the first question raised by the plaintiff, whether the step or plate in front of the engine and attached to the pilot, on which the plaintiff tried to step, at the time of the accident was *by reason of defendant's negligence* insecurely fastened," etc. (Rec., p. 101).

Again (Rec., p. 102), the court said: "Now, as to the duty of providing reasonable and safe places for the servants to work, the court instructs you that when a place is in such a condition as similar places under like conditions are usually kept by well managed railroad corporations, then the company has fully discharged its duty towards its employees, and is not liable for injuries sustained by its servants," etc. While this charge was dealing with the question of the track it is broad enough to cover all involved, and again, lower down, speaking of the track, the court says: "Now in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company is

guilty of negligence in allowing at that time and that place a track to remain with spaces between the cross-ties unfilled whereby its servants or employees might get their foot caught and perhaps get injured."

Again (Rec., p. 103): "It is for you to determine, after giving due weight to all the testimony, whether you think, in view of the fact, that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence—not extraordinary, but ordinary diligence to fill up its track—the spaces between the cross-ties before the time when this accident occurred on the night of February 5; or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that they might settle the roadbed and the yards be drained."

As to the condition of the track, the first paragraph on Rec., p. 106 again emphasizes the duty of the company simply to exercising ordinary diligence.

On Rec., page 108, after the court had repeated the charge alleged to be error on page 100, it qualifies it by the following explanatory sentence: "Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant and was found to be in perfect condition, then if within a short time before the accident occurred after it left some central place * * * or a short time before it reached here something unknown to any person caused it to become loose, then, gentlemen of the jury, they would not be guilty of

negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order."

This charge more elaborate and lengthy than the other, specifically called the attention of the jury to the fact that the question was one of negligence and pointed out the specific things that would or would not constitute negligence, adding, " If you find that it has exercised due diligence, such as any ordinary reasonable man would exercise in matters of that kind," then it would not be liable.

And again, " On the other hand, if they had not" (that is, exercised due diligence), " and it was loose, or if it was loose at such a time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable." And again following this: " Of course, so far as the railroad company is concerned it does not in any event become the insurer of its servants' or employees' safety regardless of his own diligence. All it undertakes to do is to keep the machinery and its right of way and places where they work, in good and proper order and use such diligence as a prudent and careful man would use."

The rule of this and other courts is so well settled that it is hardly necessary to cite authorities to show that a case will not be reversed for mere verbal criticisms, ambiguities, omissions of qualifying words, or where sentences, propositions or disjunctive phrases taken by themselves do not

state the law, especially when the law of the case is covered by other parts of the charge. Upon this point we cite the following cases:

In Ry. *v.* Whitton, 13 Wall, the court, at page 290, says:

"But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they represent, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence."

In Baltimore & Potomac Ry. *v.* Mackey, 157 U. S., at page 84, an instruction as follows was given:

"The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; * * * "

And the court in that connection at page 86 said:

"The next objection urged by the defendant, in support of its second assignment of error, is that the words 'as far as possible,' in the first of the above instructions, imposed upon the railroad company a higher degree of care in selecting and keeping in order its appliances and machinery than the law requires. It may be observed that the objection to the instruction containing the particular words complained of was general in its nature. The instruction embodied some propositions of law to which no objection could be properly made, and it was the duty of the defendant to point out, specifically, the part of the instruction which it regarded as announcing an erroneous principle of law. But we need not put our decision entirely upon this ground;

for it is clear that the jury could not have been misled by the use of the words 'as far as possible.' The instruction in which these words are found distinctly informed the jury that the law imposed upon the company the duty of execising 'reasonable care and caution.' And in its charge to the jury the court said: 'Was that brake in proper reasonable condition? If it was not in a proper, reasonable condition, did the cars roll back in consequence of that infirmity? Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied, from the evidence in this case, that this brake was in a reasonably good condition, in good ordinary repair, and there was nothing wrong about it, then the plaintiff cannot recover, because that would end the case.' Again: 'So, you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned, is, was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion, and if not, was such fact the cause of the accident, or did it materially or directly contribute to it?' Taking the instructions and the entire charge of the court together, it is manifest that the jury understood the words 'as far as possible'—if they thought at all of mere words— to mean 'as far as possible,' *exercising reasonable care and caution.*"

In Rogers *v.* The Marshal, 1 Wall., 644, 654, Mr. Justice Davis, speaking for the court, well observed that "a nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury."

And in Evanston *v.* Gunn, 99 U. S., 660, 668, Mr. Justice Strong said: "Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled." And so in Tweed's case, 16 Wall., 504, 516: "Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, while it appears that the complaining party made no effort at the trial to have the point explained."

See also The Sybil, 4 Wheat., 98.

In State *v.* Levelle, 27 Am. St. Rep., at page 809, the court said:

"Under this ground the appellant's counsel further objects to the definition of malice as given by the circuit judge, because it omits the word 'intentionally,' and claims that a correct definition should read: ' 'Malice means the doing of an unlawful act intentionally, without justification or excuse.' Perhaps this criticism might be well founded if we confined our attention solely to the particular sentence upon which it is based; but when the whole charge is considered together, as the rule requires it to be, there is plainly no foundation for the exception. From what we can discover as to the nature of the case in which this charge was made, as well from the record as the argument here, it does not seem to us that the omission of this qualifying word in defining the word 'malice' could possibly have prejudiced the prisoner."

In Ry. *v.* Hill, 30 Am. St. Rep., at page 72, the court said:

"It is the settled doctrine of this court 'that the general charge given *ex mero motu* in the court below should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of its context; and if any part, when so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the particular clause might be if its meaning was not controlled by prior or subsequent passages."

In Ry. *v.* Watson, 5 Am. St. Rep., at pages 579-80, the court said:

"The fourth instruction given by the court reads thus: 'The general rule is, that when a servant, before he enters the service, knows it to be hazardous, or voluntarily continues his service, without objection or complaint, when he has such knowledge, he is presumed to contract with reference to the state of things as they are known to him, and if he knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risks upon himself, and in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, the master is not required to take better care of his servant than he takes of himself.' "

Appellant's counsel dissects this instruction, and seizing on the words "without objection or complaint," assails it as erroneous.

This course cannot be successfully pursued. The instruction must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking some fragments dislocated from their proper connections, nor is one instruction to be taken as complete in itself. This instruction must, as is well settled, be taken as an entirety, and in connection with the others referring to the same subject and immediately connected with it.

The following note from 99 Am. Dec., on page 130, states the proposition correctly, to-wit:

"All the instructions given by the trial court, both in civil and criminal cases, must be construed together; and if, when thus construed, the law be correctly expounded, the judgment will not be reversed because a single instruction, taken by itself, is too broad in its terms, or otherwise erroneous."

See also in Mask *v.* State, 36 Miss., p. 91.
Hemingway *v.* Railway, 7 Am. St. Rep., 829.
Tagg *v.* McGeorge, 35 Am. St. Rep., 891.

OPINION OF THE COURT OF APPEALS.

We submit that the opinion of the court of appeals is amply supported by the testimony. In fact with the verdict of the jury and the unanimous opinion of that court that there was sufficient evidence to support the verdict, it is no longer an open question here. Even the dissenting opinion does not deny that there was evidence to support the verdict

of the jury. The statement of facts set out in the opinion of the court of appeals is abundantly supported both by the letter and substance of the testimony, notwithstanding the comment of counsel in their brief on isolated excerpts from the evidence and the opinion.

Plaintiff Tennessee testified that it was not only the custom of defendant's road but of other roads to ride in on this step; that it was part of his duty and he had never been told not to do so. (Printed Record of this Court, page 39.)

Counsel again say "there is no evidence whatever in the record that plaintiff had ever been commanded by a single conductor to ride on the front end of an engine."

Now we refer the court to the record page 43 of Tennessee's evidence:

"Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir; that's the instructions from the conductors."

The record fairly bristles with the fact that brakemen were allowed to ride on the front step in the discharge of their duty; that if not peremptorily ordered by the conductors to do so no remonstrance was made; that if there was any rule against it, it was habitually violated by the company and hence not binding.

THE DISSENTING OPINION.

Judge Sanborn, in his dissenting opinion, selects three paragraphs from different parts of the charge which he states was an erroneous declaration of the law of master and servant. The last two of these were not even excepted to by the counsel of the railroad, and neither were assigned as error. The charge of the trial court was given orally, and by consent, each party was to save all exceptions to the instruction given by the court. After the charge was written out defendant only saved exceptions to the first of these three alleged errors and only assigned the first as error. (See Printed Record, pp. 100, 101, and 108.)

These declarations could not have misled the jury if they were not of sufficient importance for learned counsel, under this blanket provision, to have saved exceptions.

Plaintiff in error made no effort to furnish the court a more correct statement of the law of master and servant, unless it is in instruction No. 1 offered by it. But we submit that this instruction No. 1 contains the same vice that it complains of in this part of the court's charge, unless the latter qualifying clauses correct the same. It starts out by saying, "the presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work." It does not attempt to qualify it in words, at least by saying that the master is required to exercise reasonable and ordinary diligence in that behalf. We submit that this alone should estop the plaintiff in error as to this branch of the court's charge. (Rec., p. 109.)

The other objection urged by the learned dissenting judge was to the word "considerable," in which the lower court stated: "If he was careless himself or if the want of attention to his own safety contributed in any considerable degree to his injury, the railroad company is not liable." If this was error at all the reasoning of the majority of the court clearly shows that it was harmless. Webster defines this word primarily to mean "worthy of consideration, required to be observed, borne in mind, or attended to." **Now we submit that there is no difference between this charge and if the court had instructed if it contributed in any degree. What he evidently meant was if his negligence** was such as to be observed or attended to, or borne in mind then it was of such a degree as would bar the defendant from recovery.

But whatever vice was contained in this part of the charge, was cured by the court telling the jury in its various parts what particular acts would be such contributory negligence as would bar a recovery.

Without attempting to cite all of the charge that bore upon this point we call attention of the court to the following paragraphs:

"The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

"If under the rules either as communicated to him or as he should have known them by the exercise of due diligence, he was not permitted to get on there, yet in violation

of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving away and he cannot recover.

" But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act, could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by having done so, then he cannot recover. (Rec., p. 101.)

" Provided also that the plaintiff, at the time of the accident, did not know, or by . the exercise of (reasonable) diligence could not have known, the condition of the track; but if he knew the condition of the track or could have known it by the exercise of reasonable diligence and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover. (Rec., p. 102.)

" Now, the knowledge on the part of the plaintiff of the condition of the tracks as well as of the machinery is very important, for if an employee has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is

not the kind of danger I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

" Now, if he sees that the place is dangerous, and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts, then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having filled it up, for the servant has a right to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the facts, then he must do so at his peril.

" Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or the step as the evidence shows it was in, or not."

" If he did not know it and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

" But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own

experience told him he should not get on and when there was other provisions and better provisions made for a man to get on a train while it was moving, then, gentlemen of the jury, he cannot recover.

"An employee cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

"But, on the other hand, if he had no business to get on that plate but his duty was to jump on the back step, or the step back of the engine, which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not, if that was the proximate cause of the injury he received, he cannot recover.

"If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence, but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact it was a new track, then the plaintiff cannot recover." (Rec., pp. 104, 105 and 106.)

By reason of this corporation being formed under an act of Congress "it was born in the purple," and hence has the privilege of taking this plaintiff from the lowest to the highest court in the land.

We submit that the law has been correctly and liberally given in favor of the plaintiff in error; that evidence shows liability to plaintiff, and that the judgments of the lower courts should be affirmed.

Respectfully submitted,

J. W. HOUSE,

J. E. WILLIAMS,

J. W. BLACKWOOD,

Attorneys for Defendant in Error.